IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35299

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 743**
	)	
Plaintiff-Respondent,	)	**Filed: December 30, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
ABIJAH BIJE SHELLEY,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Judgment of conviction and unified sentence of ten years, with three years determinate, for driving under the influence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Abijah Bije Shelley appeals from his judgment of conviction for felony driving under the influence of alcohol (DUI), Idaho Code §§ 18-8004, 18-8005(7). Specifically, Shelley challenges the district court's admission of opinion testimony from the arresting officer and asserts that the district court abused its discretion by imposing an excessive sentence. We affirm.

I.
BACKGROUND

On September 23, 2007, Shelley was observed by Deputy Miner as he parked his vehicle outside of a Kuna bar. Deputy Miner observed Shelley stumble upon exiting his car before entering the bar. He then followed Shelley into the bar where they both stayed for about twenty minutes. Deputy Miner followed Shelley upon exiting the bar but momentarily lost sight of

Shelley. Shelley reached his vehicle and left the parking lot. When Deputy Miner next saw Shelley, he observed Shelley driving without his headlights on and pulled him over.

Deputy Miner testified that when he pulled Shelley over, Shelley smelled of alcohol, his eyes were red and watery, and he admitted to having had one drink. Deputy Miner requested that Shelley perform field sobriety tests and submit to a breath test, but Shelley refused. Deputy Miner testified that after searching Shelley's vehicle, he found open containers of alcoholic energy-type drinks in the cab of the pickup. Shelley was arrested and charged with felony DUI and misdemeanor driving with an invalid license.

During trial, the prosecutor asked Deputy Miner his opinion on whether Shelley was under the influence of alcohol. After Shelley's objection to the question was overruled by the district court, Deputy Miner testified that based on his training and experience, and observations, his belief was that Shelley was under the influence of alcohol. Shelley was found guilty of and convicted of felony DUI and misdemeanor driving with an invalid license.[1] The district court imposed a unified sentence of ten years with three years determinate for felony DUI. Shelley now appeals.

II.
DISCUSSION

A. Opinion Testimony

Shelley argues that Deputy Miner's testimony about whether he believed Shelley was under the influence of alcohol was an ultimate issue for the jury's determination and, therefore, it impermissibly invaded the province of the jury. The trial court has broad discretion in determining the admissibility of testimonial evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. *Id.*

Idaho Rule of Evidence 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, an expert may not tender his opinion as to *the* ultimate fact in a criminal trial, meaning the defendant's guilt or innocence of the crime charged. *See State v. Walters*, 120 Idaho 46, 55, 813 P.2d 857, 866 (1991) (concluding testimony that Walters was the

[1] Shelley does not pursue any issues on appeal with regard to the misdemeanor conviction and sentence.

arsonist was improper because it embraced the ultimate fact, whether the defendant was guilty of the crime charged, which was for the jury to determine); *see also State v. Hester*, 114 Idaho 688, 695-96, 760 P.2d 27, 34-35 (1988) (holding that expert testimony that a child had been abused, an ultimate issue for the jury, was proper and did not invade the province of the jury, but additionally holding that the expert exceeded the proper bounds of expert testimony when the expert testified that Hester was the abuser because it embraced the ultimate issue in the case, whether the defendant was guilty of the crime charged).

Shelley asserts that the officer's opinion testimony embraced *the* ultimate issue for the jury to determine and therefore, it was an abuse of discretion to let it in. However, we conclude that the district court was within its discretion when it allowed the evidence. In coming to this conclusion we rely on *State v. Corwin*, 147 Idaho 893, 216 P.3d 651 (Ct. App. 2009). *Corwin* bears several similarities to the instant case. There, the officers testified as to their observations and interactions with Corwin. They stated that there was a car crash, and although there was no person inside the vehicle when they arrived at the scene, they found Corwin hiding behind a nearby bush. The officers also stated that there was a strong odor of alcohol in the vehicle along with dripping liquid. They stated that Corwin's breath smelled of alcohol, his eyes were glassy and bloodshot, he appeared slightly agitated, his speech was slurred, his movements were shaky and he swayed. After Corwin failed the horizontal gaze nystagmus (HGN) test, the officers determined that he was under the influence of alcohol. Thereafter, Corwin refused to submit to a breath test. The officers testified as to his behaviors and his physical state, and from that, stated that their opinion was that he was under the influence of alcohol and too impaired to drive. This Court concluded that this went to an ultimate issue of fact, but did not invade the province of the jury as to its determination of whether Corwin was guilty of driving an automobile while under the influence of alcohol. Therefore, the district court did not abuse its discretion when it allowed the officers to testify that Corwin was under the influence of alcohol and too impaired to drive. *Corwin*, 147 Idaho at 895-97, 216 P.3d at 653-55.

Here, Deputy Miner testified about his contact with and observation of Shelley. He testified that he saw a pickup park and then saw Shelley stumble out and into a bar. While in the bar, Deputy Miner stated that he observed Shelley drink for about twenty minutes and then followed him when he left the bar. Deputy Miner then observed Shelley drive off without headlights and proceeded to pull him over. Upon making contact with Shelley, Deputy Miner

noticed that Shelley smelled of alcohol and that his eyes were red and watery. Upon questioning, Shelley admitted to having had one drink. While questioning Shelley, Deputy Miner observed that there were open containers of alcoholic energy-type drinks in the cab of the pickup. Deputy Miner further testified that based on his training and experience, and his observations of Shelley, he was of the belief that Shelley was under the influence of alcohol. Notably, Deputy Miner did not offer his opinion as to Shelley's guilt or innocence of the crime charged. Although Deputy Miner's testimony went to an ultimate issue of fact, it did not invade the province of the jury as to its determination of whether Shelley was or was not guilty of driving an automobile while under the influence of alcohol. Therefore, the district court did not abuse its discretion when it allowed Deputy Miner to testify that he viewed Shelley as being under the influence of alcohol.

B. Excessive Sentence

Shelley argues that the district court abused its discretion when it imposed a unified sentence of ten years, with three years determinate, following his conviction for felony DUI. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Shelley does not assert that his sentence exceeds the statutory maximum. However, Shelley asserts that the sentence was excessive because his job skills and employment experience should have been treated as mitigating factors. Additionally, Shelley asserts that the district

court should have given greater weight to his willingness to participate in an alcohol treatment program. During sentencing, the district court stated:

> I actually -- I sentenced you as a magistrate judge over in Elmore County -- it would have been 1994 -- and felt at that time that -- I don't have a real clear recollection of it, but there was certainly significant jail and a two-year probation which tells me that, at that point, I was really concerned that there had been the prior DUI. It hadn't been that much earlier.
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> . . . .
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> And then, things got worse. In 1997, there was another DUI over in Elmore County. . . . But there was still alcohol consumption in 1999. . . . And that was a case where, frankly, as I look at this in the year 2000, that was your opportunity to truly look at yourself and say "I've reached the bottom." But, unfortunately, that didn't happen. And within a short period of time after you were released from prison, you were back drinking and driving again.
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> . . . .
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> But I can't ignore, as I said, that, clearly, there were multiple occasions where you had the opportunity to really, truly admit you're powerless to alcohol and drugs. It just hasn't happened. It's been over a lot of years. I look at the 1993 -- its 2008. That's pretty much 15 years of -- 14 years of this kind of lifestyle.
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> So, in sentencing today, the court is not going to give up on rehabilitation, but it has to take place in a structured environment, frankly, because I got a duty to protect society. And I don't have an abiding belief that you can comply with probation. They tried that, and you absconded.

The instant offense represents Shelley's fifth conviction for DUI, and his second conviction for felony DUI. Shelley has been given several opportunities to enroll in a treatment program, to no avail. The district court addressed each of the goals of sentencing before imposing what it considered an appropriate sentence. In light of the nature of the offense, Shelley's background, and the protection of the public, we conclude that the district court did not impose an excessively harsh sentence and, therefore, did not abuse its discretion.

III.

CONCLUSION

We conclude that the district court did not abuse its discretion when it allowed Deputy Miner to testify that Shelley was under the influence of alcohol. Furthermore, the district court did not abuse its discretion in imposing the sentence. Accordingly, the judgment of conviction and sentence for felony driving under the influence is affirmed.

Chief Judge LANSING and Judge MELANSON **CONCUR**.